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RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

WESTERN TRANSPORTATION COMPANY v. DOWNER.

In an action against a carrier for injury to goods, an instruction that "if the jury believe from the evidence that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading—that is to say, if it was occasioned by perils of navigation of the lakes and rivers, then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence," was a correct statement of the law, and should have been given.

Where the carrier has given evidence from which the jury may infer that the injury occurred from a cause excepted in the bill of lading, the burden is cast on the plaintiff to show negligence.

An instruction that "the bill of lading in this case excepts the defendant from liability from perils of navigation, it is incumbent on the defendant to bring itself within the exception, and it is the duty of the defendant to show that it has not been guilty of negligence," is erroneous.

The terms "dangers of lake navigation" include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors.

A presumption of negligence from the simple occurrence of an accident seldom arises except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.

THIS was an action in the Circuit Court for the Northern District of Illinois, against a carrier for injury to coffee shipped on one of its boats from New York to Chicago.

At the trial the plaintiff proved the delivery of the coffee to the defendant in good condition, and its arrival at Chicago damaged; and then rested. Defendants then proved that by the bill of lading they were exempted from liability for losses by the "dangers of navigation on the lakes and rivers;" that the boat in its attempt to enter the harbor of Chicago struck on the bottom, grounded and lay until the next day, shipping so much water as to ruin the coffee; that the vessel was staunch, and that the captain was a careful and experienced seaman. Considerable evidence was given by defendant, and subsequently by plaintiff, by which it appeared that the vessel undertook to enter at about eight o'clock on a dark and stormy night; that the channel of

entrance to the port was narrow and somewhat shifting; in fact had shifted somewhat during the two seasons previous to this accident; that the captain had not entered the port for about two years previous, and that another vessel drawing more water had come safely into the port somewhat later the same night. There was considerable conflict of testimony as to the proper course for a master to pursue under the circumstances, and the prudence and skill of the captain's action in this case.

The defendant requested the court to charge that "if the jury believe from the evidence that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence—that is to say, if it was occasioned by perils of navigation of the lakes and rivers, then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence."

This the court declined to do, and charged that "the bill of lading in this case excepts the defendant from liability, when the property is not insured, from perils of navigation. It is incumbent on the defendant to bring itself within the exception, and it is the duty of the defendant to show that it has not been guilty of negligence."

To both of these points defendant excepted, and the jury having found a verdict for plaintiff, the defendant brought this writ of error.

The opinion of the court was delivered by

FIELD, J. (after stating the facts).—On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss of the coffee was occasioned in the manner already stated; that is, by one of the dangers of lake navigation. These terms, "dangers of lake navigation," include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to

show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred. In *Clark v. Barnwell*, 12 How. 272, the precise point was involved, and the decision of the court in that case is decisive of the question in this. And that decision rests on principle. A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in *Scott v. The London and St. Catharine Dock Company*, 3 H. & C. 596, the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said, "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

So in *Curtis v. The Rochester and Syracuse Railroad Company*, 18 N. Y. 543, the Court of Appeals of New York held that the mere fact that a passenger on a railroad car was injured by the

train running off a switch was not of itself, without proof of the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court said that carriers of passengers were not insurers, and that many injuries might occur to those they transported for which they were not responsible, but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them, free from any defect which the utmost knowledge, skill, and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it.

It is plain that the grounds stated in these cases, upon which a presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery by the plaintiff, the burden of proof rested upon him.

For the error in the refusal of the instruction prayed and in the instruction given, the judgment must be reversed, and the cause remanded for a new trial.

The foregoing case presents with unusual singleness, the question of the burden of proof in actions against a carrier for loss of goods, where the defence is that the loss occurred from a cause excepted in the contract of bailment.

The plaintiff in actions of this kind having proved the delivery of the goods to the carrier, and the carrier's failure to deliver at the destination, has *prima facie* made out his case and may rest.

The carrier then has the burden of showing that the goods were lost through a cause for which he was not responsible; *e. g.* the act of God, the negligence of the plaintiff, or a cause excepted in the bill of lading. Up to this point there is no difference in the decisions either English or American. But although the loss may have occurred through one of the excepted causes, yet if it could have been avoided by proper care and skill on the part of the carrier, he

will still be responsible, and if, as in the principal case, the evidence as to care and skill be conflicting, upon whom is the burden of proof?

Upon one hand he carrier alleges an exception to his liability, and he must bring himself within it. The "dangers of navigation," for example, are such dangers as skill and diligence cannot provide against. The carrier does not bring himself within the exception, unless he shows that he used skill and diligence. The burden is on him to show all the elements which are required to make up the exception which relieves him; not merely the accident, but his freedom from negligence contributory to it. Proof in the principal case that the vessel ran aground, and sprang a leak, whereby the coffee was damaged, did not prove that she ran aground by a danger of navigation. Something more was required in the way of affirmative proof that the accident was unavoidable by ordinary care and skill, and this proof the carrier was bound to furnish.

On the other hand the ground of the carrier's liability in the case presented, is his negligence, and negligence is a fact not to be presumed, but to be proved by the party alleging it. The burden of proof does not shift from time to time during the trial (though the weight of the evidence may) but remains on the party on whom it is first cast, unless the other party defends on a new and distinct proposition. The party to the support of whose cause proof of negligence is necessary, has the burden in the first instance, and it remains with him throughout.

1. Prof. Greenleaf lays down the rule; "If the acceptance of the goods was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want

of due care;" 2 Greenleaf on Evidence, sec. 219.

In *Whitesides v. Russell*, 8 W. & S. 44, a steamboat ran on a rock in the Ohio river and knocked a hole in her bottom, whereby her cargo was damaged. The bill of lading excepted losses by "dangers of the river," and the carrier was held to have the *onus* of proving, not only how the loss occurred, but that he had used due diligence and skill.

So also in *Hays v. Kennedy*, 41 Penna. St. 378, where LOWRIE, C. J., says: "From the very nature of the relation the burden of the proof of a loss by inevitable accident is thrown upon the carrier. He must prove not only an accident which the law admits as inevitable in its character, but also that he was *guilty of no fault in falling into the danger*, or in his efforts to extricate himself from it."

And in *Graham v. Davis*, 4 Ohio St. 382, RANNEY, J., states the argument on this side with great clearness: "Counsel for the plaintiffs in error admit that it was incumbent upon them to have shown that the goods were lost by one of the excepted perils; but they insist that the burden of proof was then shifted upon the owners, and that they were bound to prove negligence before the carriers could be charged. We think this dividing a thing in its nature indivisible. Either the loss was occasioned by a peril of navigation, or by the negligence of those in charge of the boat. It must have been one or the other, and could not have been both. If proper care could have avoided it, it was not a peril incident to navigation; if such care could not, it was. From the very nature of the undertaking, without care the loss was inevitable; and with care it might be unavoidable. From the failure to deliver the goods, the law raised the presumption of negligence against the carriers—*primâ facie*, the

fault was theirs—and this presumption could only be rebutted by showing that they were without fault. As positive care was indispensable to the safety of the goods, they could meet and overthrow the legal presumption of negligence in no other way than by showing that such care was exercised. Proof that the boat was snagged, fell short of proving that it was not snagged by the fault of those in charge of it; and, consequently, short of overcoming the *prima facie* case of the plaintiffs below. To do this, it was not enough to have shown that the loss was occasioned by what might or might not have been a danger of navigation; nothing short of proof that it was the one and not the other could have been sufficient; as nothing short of that could bring the case within the exception provided for in the contract."

This rule is well established in other states: *Swindler v. Hilliard*, 2 Rich. 268; *Baker v. Brinson*, 9 Rich. 201; *Berry v. Cooper*, 28 Geo. 543; *Turney v. Wilson*, 7 Yerg. 340; *Hill v. Sturgeon*, 28 Mo. 327. See also *Murphy v. Staton*, 3 Munford 239; *Michaels v. N. Y. &c. R. R. Co.*, 30 N. Y. 564, and *Read v. Spaulding*, 30 N. Y. 630.

2. *Muddle v. Stride*, 9 C. & P. 380, was an action for damage to goods, and the carriers defended on the ground that the damage was caused by a peril of the sea. Lord DENMAN, in charging the jury, said, "The injury appears to me of a very mysterious kind. The goods appear to have been injured by some liquid of an offensive character. If you think that was the consequence of any ill care in the packing of the goods on board the vessel the defendants will be liable. * * * If on the whole in your opinion it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict, because you are to see clearly that they were

guilty of negligence before you can find a verdict against them. If it turns out that the injury may as well be attributable to the one cause as the other, then also the defendants will be entitled to your verdict." This was a *nisi prius* case, tried in 1840, and we cannot find that the precise point as to the burden of proof has since arisen in the English courts.

In the case of *Clark v. Barnwell*, 12 Howard 272, the Supreme Court of the United States adopted the rule of Lord DENMAN in *Muddle v. Stride*, and held in the language of NELSON, J., who delivered the opinion, that "Although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is on the plaintiff to establish the negligence, as the affirmative lies on him."

This case did not perhaps on the facts as reported, go the full length of deciding that where the evidence shows only a state of facts from which the jury may infer that the loss was by a peril of the sea, the burden is on plaintiff to prove negligence affirmatively, but it certainly tended strongly that way, and has usually been so considered in the cases which have subsequently arisen in the circuit and district courts.

Thus in *Hunt v. The Propeller Cleveland*, 6 McL. 76, there was no positive proof as to how the damage occurred, but it was in evidence that the vessel was tight and staunch when she started, and that she had encountered a heavy gale, during which the sea made a clean breach over her and stove in the larboard gangway, which caused her to ship a large quantity of water. DRUMMOND, J., in delivering judgment said: "It seems fairly to be inferred from the proofs that the damage was caused by the gale of wind which resulted in wetting the merchandise

either by leakage of the vessel or by shipping water. The damage is thus shown to be caused by the dangers of navigation. It follows that the shipper must establish negligence or want of skill in the carrier." See also *Turner v. The Black Warrior*, 1 McA. 181; *N. J. Steamboat Co. v. Merchants' Bank*, 6 How. 344.

The instruction refused by the court below, in the principal case, that "*if the jury believe from the evidence that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading—that is to say, if it was occasioned by perils of navigation of the lakes and rivers, then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff*," was correct according

to all the cases; for the point at which they diverge is *where on the evidence the jury may be in doubt whether the loss was within the exception or not*. (And it is just at this point that the burden of proof becomes important.) The judgment therefore was properly reversed for this error, but the Supreme Court must be considered as going to the full length and settling the rule in the federal courts, that where the carrier gives *sufficient evidence to justify the jury in inferring that the loss arose from an excepted cause*, though on the whole evidence the cause be left doubtful, there the burden of proof is on the plaintiff to establish negligence. This rule we think is to be regretted, as it is at variance with that established in the principal state courts.

J. T. M.

Supreme Court of Illinois.

THE PEOPLE EX REL. O'CONNEL v. TURNER.

An Act of the legislature creating a reform school, and providing for the summary commitment to it of children who are "destitute of proper parental care and growing up in mendicancy, ignorance, idleness, or vice," is unconstitutional, as it prescribes a virtual imprisonment without due process of law.

Besides the objection to the summary method of proceeding prescribed, such an act, so far as it restrains liberty for any cause except actual crime, is in violation of the Bill of Rights, which declares that all men have certain inherent rights, among which is liberty.

The rights of the state and of parents over children, stated and discussed by THORNTON, J.

THIS was a writ of *habeas corpus*, directed to the superintendent of the Reform School of the city of Chicago.

The first act, in relation to this "Reform School," is a part of the charter of the city of Chicago, approved February 13th 1863, and the second is entitled "An Act in reference to the Reform School of the City of Chicago," approved March 5th 1867. The first section establishes a school for the safe keeping, education, employment, and reformation of all children, between